

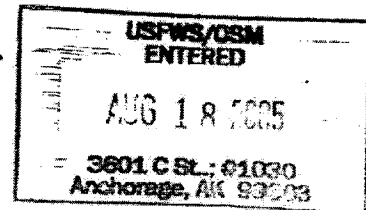
STATE OF ALASKA

DEPARTMENT OF FISH AND GAME OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

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August 18, 2005



Mr. Mitch Demientieff, Chair
Federal Subsistence Board
Office of Subsistence Management
3601 C Street, Suite 1030
Anchorage, AK 99503

Dear Mr. Demientieff:

As provided for in Subpart B, 36 CFR § 242.20 (DOA); 50 CFR § 100.20, of the Subsistence Management Regulations for Public Lands in Alaska, the Alaska Department of Fish and Game hereby requests that the Federal Subsistence Board reconsider action taken at its May 2005 meeting regarding authorization of sale of handicraft items made from brown and black bear claws, teeth, skulls and bones and its decision to defer action on restraint of commercial sales of such items. The attached Request for Reconsideration details the reasons for our opposition to this new federal regulation as adopted.

I urge the federal board to carefully consider this request and act expeditiously. Thank you for your attention to this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "McKie Campbell".

McKie Campbell
Commissioner

Enclosure

cc: Wayne Regelin, Deputy Commissioner, Alaska Department of Fish and Game

Attachment 2
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AUG 18 2005

3601 C St., #1000
Anchorage, AK 99503

**REQUEST FOR RECONSIDERATION
OF FEDERAL SUBSISTENCE BOARD PROPOSAL WP05-01**

By State of Alaska

August 18, 2005

I. Introduction.

The State of Alaska, through the Alaska Department of Fish and Game (ADF&G) respectfully requests that the Federal Subsistence Board (Board) reconsider its decision of May 4, 2005 on Proposal WP05-01, adopting final rules relating to the sale of claws and other parts of bears taken for subsistence and deferring action on constraint of commercial sales. Reconsideration is required because in adopting the final rules, "existing information used by the Board [was] incorrect" and "the Board's interpretation of information, applicable law, or regulation [was] in error or contrary to existing law." 36 CFR § 242.20(d); 50 CFR § 100.20(d). Allowing the unconstrained sale of bear claws under current conditions is inconsistent with the Alaska National Interest Lands Conservation Act (ANILCA) because (1) the practice is inconsistent with sound wildlife management principles, (2) because it is based on incorrect information used by the Board, (3) because it allows a practice that has not been demonstrated to be customary and traditional, (4) because it potentially allows "commercial" sales, and (5) because, to the extent that it is interpreted to allow purchase of claws, teeth, bones, and skulls by persons who are not rural Alaska residents, it exceeds the jurisdiction of the Board. The regulations allowing the sale of grizzly bear claws, teeth, skulls, and bones were also adopted in violation of 16 U.S.C. § 1536(a) (Endangered Species Act: Interagency Cooperation) because the Board, despite concerns raised relating to impacts on endangered and threatened species outside Alaska, failed to consult with the Secretary to insure that its action "is not likely to jeopardize the continued existence of any endangered species or threatened species." Because the adopted regulations purport to authorize sales as a customary and traditional activity when such sales were not supported as such on the record, because the regulations have been interpreted to allow purchase of claws, teeth, skulls and bones by nonfederally qualified subsistence users, despite the fact that such purchase is prohibited under state law, and because of the other deficiencies noted above, the regulations allowing sales of bear handicrafts are arbitrary and capricious. The new regulations compound and expand the problems caused by the Board's action on WP04-01, for which the State of Alaska submitted a timely request for reconsideration (Attachment 1), rejected by the Board on November 1, 2004. (See Attachment 2). As required by 36 CFR § 242.20(d)(4) and 50 CFR § 100.20(d)(4), a detailed statement follows.

**REQUEST FOR RECONSIDERATION
OF FEDERAL SUBSISTENCE BOARD PROPOSAL WP05-01**

By State of Alaska

August 18, 2005

I. Introduction.

The State of Alaska, through the Alaska Department of Fish and Game (ADF&G) respectfully requests that the Federal Subsistence Board (Board) reconsider its decision of May 4, 2005 on Proposal WP05-01, adopting final rules relating to the sale of claws and other parts of bears taken for subsistence and deferring action on constraint of commercial sales. Reconsideration is required because in adopting the final rules, "existing information used by the Board [was] incorrect" and "the Board's interpretation of information, applicable law, or regulation [was] in error or contrary to existing law." 36 CFR § 242.20(d); 50 CFR § 100.20(d). Allowing the unconstrained sale of bear claws under current conditions is inconsistent with the Alaska National Interest Lands Conservation Act (ANILCA) because (1) the practice is inconsistent with sound wildlife management principles, (2) because it is based on incorrect information used by the Board, (3) because it allows a practice that has not been demonstrated to be customary and traditional, (4) because it potentially allows "commercial" sales, and (5) because, to the extent that it is interpreted to allow purchase of claws, teeth, bones, and skulls by persons who are not rural Alaska residents, it exceeds the jurisdiction of the Board. The regulations allowing the sale of grizzly bear claws, teeth, skulls, and bones were also adopted in violation of 16 U.S.C. § 1536(a) (Endangered Species Act: Interagency Cooperation) because the Board, despite concerns raised relating to impacts on endangered and threatened species outside Alaska, failed to consult with the Secretary to insure that its action "is not likely to jeopardize the continued existence of any endangered species or threatened species." Because the adopted regulations purport to authorize sales as a customary and traditional activity when such sales were not supported as such on the record, because the regulations have been interpreted to allow purchase of claws, teeth, skulls and bones by nonfederally qualified subsistence users, despite the fact that such purchase is prohibited under state law, and because of the other deficiencies noted above, the regulations allowing sales of bear handicrafts are arbitrary and capricious. The new regulations compound and expand the problems caused by the Board's action on WP04-01, for which the State of Alaska submitted a timely request for reconsideration (Attachment 1), rejected by the Board on November 1, 2004. (See Attachment 2). As required by 36 CFR § 242.20(d)(4) and 50 CFR § 100.20(d)(4), a detailed statement follows.

II. Regulations Challenged.

At its meeting in May 2005, the Board considered Proposal WP05-01 which, as proposed, would have amended 36 CFR § 242.25 and 50 CFR § 100.25 as follows (additions in bold):

§ __.25(a) Handicraft means a finished product **made in Alaska by a rural Alaskan from nonedible byproducts of fish or wildlife which is composed wholly or in some significant respect of natural materials**, in which the shape and appearance of the natural material has been substantially changed by the skillful use of hands by sewing, **weaving, lacing, beading**, carving, etching, scrimshawing, painting, or other means, and which has substantially greater monetary and aesthetic value than the unaltered natural material alone.

Skin, hide, pelt or fur means any tanned or untanned external covering of an animal's body; ~~excluding bear~~. **However, for bear**, the skin, hide, pelt or fur ~~of a bear~~ means the entire external covering with claws attached.

§ __.25(j)(6) If you are a Federally qualified subsistence user, you may sell handicraft articles made from the **skin, hide, pelt or fur of a black bear (including claws)**.

§ __.25(j)(7) If you are a Federally qualified subsistence user, you may sell handicraft articles made from the **skin, hide, pelt or fur of a brown bear (including claws)** taken from Units 1-5, 9(A)-(C), 9(E), 12, 17, 20, and 25.

§ __.25(j)(8) If you are a business as defined under Alaska Statute 43.70.110(1), you may not purchase, receive, or sell handicrafts made from the skin, hide, pelt or fur of a black or brown bear **(including claws)**.

During its meeting in May 2005, the Board, by a 4-2 vote, amended the proposal adopting a portion of the proposal with modifications, and again by a 4-2 vote deferred action on section (j)(8) of the proposal until the 2006 wildlife meeting. The Board adopted the following language (the newly added language is underlined, deleted language is not shown):

§ ----.25 Subsistence taking of fish, wildlife, and shellfish: general regulations.

(a) Definitions. The following definitions shall apply to all regulations

contained in this part:

...

Handicraft means a finished product made by a rural Alaskan resident from the nonedible byproducts of fish or wildlife and is composed wholly or in some significant respect of natural materials. The shape and appearance of the natural material must be substantially changed by the skillful use of hands, such as sewing, weaving, drilling, lacing, beading, carving, etching, scrimshawing, painting, or other means, and incorporated into a work of art, regalia, clothing, or other creative expression, and can be either traditional or contemporary in design. The handicraft must have substantially greater monetary and aesthetic value than the unaltered natural material alone.

...

Skin, hide, pelt, or fur means any tanned or untanned external covering of an animal's body. However, for bear, the skin, hide, pelt, or fur means the external covering with claws attached.

...

(j) Utilization of fish, wildlife, or shellfish.

...

(6) If you are a Federally-qualified subsistence user, you may sell handicraft articles made from the skin, hide, pelt, or fur, including claws, of a black bear.

(i) In Units 1, 2, 3, 4, and 5, you may sell handicraft articles made from the skin, hide, pelt, fur, claws, bones, teeth, sinew, or skulls of a black bear taken from Units 1, 2, 3, or 5.

(ii) [Reserved].

(7) If you are a Federally-qualified subsistence user, you may sell handicraft articles made from the skin, hide, pelt, or fur, including claws, of a brown bear taken from Units 1-5, 9A-C, 9E, 12, 17, 20, and 25.

(i) In Units 1, 2, 3, 4, and 5, you may sell handicraft articles made from the skin, hide, pelt, fur, claws, bones, teeth, sinew, or skulls of a brown bear taken from Units 1, 4, or 5.

(ii) [Reserved].

Action was deferred on the following language:

§ __.25(j)8(a) You may not sell handicrafts made from the claws of a black or brown bear to an entity operating as a business as defined in Alaska Statute 43.70.110(1), unless the bear was taken in Units 1-5.

§ __.25(j)8(b) If you are a business as defined under Alaska Statute 43.70.110(1) you may not purchase handicrafts made from the claws of a black or brown bear as part of your business transactions, unless the bear was taken in Units 1-5.

§ __.25(j)8(c) The sale of handicrafts made from the non-edible byproducts of brown and black bears, when authorized in this part, may not constitute a significant commercial enterprise.

For black bears, the effect of the regulatory amendments and deferment of action on the issue of commercial sales is to continue to permit the unconstrained sale of handicraft items made from the claws of black bears taken on any federal public lands in Alaska, and additionally, in Southeast Alaska (Units 1, 2, 3, 4, and 5) to allow unconstrained sales of handicraft articles made from bones, teeth, sinew, and skulls of black bears taken from Units 1, 2, 3 or 5.

For brown bears, the effect of the regulatory amendments and deferment of action on the issue of commercial sales is to continue to permit the unconstrained sale of handicraft items made from claws of animals taken in management units in Southeast Alaska, the Bristol Bay area, and Eastern Interior Area. Additionally, in Southeast Alaska (Units 1, 2, 3, 4, and 5) the regulatory action allows unconstrained sales of handicraft articles made from bones, teeth, sinew, and skulls of brown bears taken from Units 1, 4, or 5.

The adopted regulations impose no limits on the amount of money that may be exchanged for the handicraft items and contain no enforcement or tracking mechanisms to ensure that sales are limited to parts of bears that have been legally taken in a federal subsistence hunt in a designated area. According to a draft Q&A informational sheet prepared by federal staff (Attachment 3), although sale and resale is limited to federally qualified rural residents, the Federal Subsistence Board interprets the regulations to allow anyone to purchase bear claw handicrafts (despite state statutes and regulations that generally prohibit purchase).

III. Discussion: The Regulations are Inconsistent with ANILCA, Were Adopted in Violation of Section 7 of the Endangered Species Act, and are Arbitrary.

A. The regulations are inconsistent with “sound management principles, and the conservation of healthy populations of fish and wildlife.”

The Board's actions on WP05-01 expand and continue the problems caused by the Board's actions on WP04-01 and are inconsistent with sound management principles for the same reasons raised in the state's Request for Reconsideration on WP04-01, (Attachment 1) hereby incorporated by reference, as well as for the reasons set forth herein. The Board has created a brand new market for bear claws which is likely to mask illegal sales, compounding problems with the international trade of Endangered Species, and contributing to the illegal harvest, overharvest, and waste of bears in Alaska and in other states and countries. The Board's actions on WP05-01 expanded the previously created market for bear parts and failed to restrict sales to customary and traditional use, failed to restrict sales by businesses, failed to prohibit sales amounting to significant commercial enterprises, and failed to implement any kind of a tracking mechanism to make the regulations enforceable. The regulations should be reconsidered and amended to prohibit the commercial sale of handicraft items made from bear claws, with sales limited to sales to other federally qualified subsistence users for customary and traditional uses.

In enunciating its policy in adopting the subsistence priority in ANILCA, Congress was careful to qualify that the subsistence priority would be subject to sound management and conservation principles:

It is hereby declared to be the policy of Congress that –

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, ... consistent with management of fish and wildlife in accordance with recognized scientific principles ... the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so....

16 U.S.C. § 3112(1). Regional Advisory Council (RAC) recommendations “concerning the taking of fish and wildlife on the public lands for subsistence uses” are to be given a certain amount of deference, but may be rejected when it is determined that they are “not supported by substantial evidence” or would “violate recognized principles of fish and wildlife conservation.” 16 U.S.C. § 3115(c).

Both North American brown and black bears are listed on Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a global treaty aimed at control of trade in endangered and threatened species.

Materials at 214. In addition, the Brown bear populations in the 48 conterminous states are listed as threatened under the Endangered Species Act and populations in Mexico are listed as endangered. *See* 50 CFR 17.11.

As indicated in the state's comments and in comments by federal enforcement officers in the discussions on WP05-01, the regulations, allowing unlimited and untracked sales of bear claws, teeth, bones, and skulls, violate sound management principles. Concerns regarding brown bear populations within Alaska, as well as general concerns about conservation of bears nationally and internationally were raised.

ADF&G's written comments raised its concerns about the conservation impacts of the proposal:

Do not support the proposal. The Department's primary concerns are that any regulations authorizing the sale of handicrafts made from claws of brown and black bears must reflect well-documented subsistence practices, include enforceable provisions to protect any such practice, and minimize the potential for exploitation and adverse conservation impacts to bear populations. Extending well beyond Alaska to national and international contexts, the sale of bear claws and other parts has generated a market enticing those who are far removed from subsistence traditions. Because brown bear populations reproduce at notably low rates, the Department must carefully evaluate any potential regulatory changes that could lead to adverse effects and conservation concerns. This current proposal provides neither the evidence nor regulatory provisions to address the department's concerns, which were previously raised in a Request for Reconsideration submitted to the Federal Subsistence Board in 2004 regarding the then new Federal regulation authorizing the sale of handicraft items made from the fur and claws of brown and black bears. In the current proposal, the regulatory language has been modified but still would not address potential conservation concerns associated with the sale of handicrafts made from bear fur and claws. For example, it lacks a tracking system that documents number and locations of bears harvested for the purpose of making handicraft items for sale.

For similar reasons, the Department also does not support the substantive additional modifications proposed by the Southeast and Southcentral regional councils, and supported by a majority of the Interagency Staff Committee, that would expand the scope of this regulation by authorizing the use of other body parts of black and brown bears in making handicrafts for sale.

ADF&G Comments on 2005-06 Federal Subsistence Wildlife Proposals For Presentation at the Federal Subsistence Board Meeting, May 3-4, 2005 at 1 ("ADF&G Written Comments"). These concerns were also reflected in ADF&G's oral comments. *See* Transcript at 170-71.

The Alaska Department of Law added oral comments about enforcement concerns and the need for a tracking system:

If we had some enforceable way to limit the sale of bear claws to handicraft items made by rural Alaska subsistence users, we'd have no major enforcement concerns. The existing regulations and the proposed ones contain no mechanism to effectively limit sales to those users. There's no tracking system with any kind of reporting or recording requirements. When we find someone with claws that we think might have been illegally purchased and sold, they don't have any burden to show the source as a qualified Federal subsistence user. The burden is on us as the government to prove that their source and sale was illegal. Without a tracking system in place, that's literally going to be impossible in most cases for us to do that.

We also have conservation concerns because it's logical to expect an increase in Federal subsistence harvest when you create a new motivation for harvest. An opportunity for sale of claws could make bear harvest more viable and attractive to subsistence users who otherwise had decided not to harvest bears in the past. The establishment of a Federal subsistence system without a tracking requirement more importantly creates an opportunity and motivation for non-Federal hunters and poachers to take additional bears because it can't be tracked, resulting in a very likely increase in harvest over time because of the legal market and its masking of illegal activities.

Our conclusion is that we recommend the Federal Subsistence Board create some kind of tracking system that will allow us to prevent abuses and/or limit the sale to other Federally-qualified subsistence users. That would meet the customary and traditional nature of the activities proposed and allowed and would give us a chance at preventing the abuses that I've described.

Transcript at 171-72.

The Alaska Department of Public Safety, the agency bearing primary responsibility for enforcement of fish and wildlife laws in Alaska, also provided written comments raising conservation and enforcement concerns regarding the proposal:

Oppose. We believe that allowing the sale of bear parts will increase illegal take and waste of bears, will exasperate the black market issues, will go against a North American trend that is more restrictive concerning sale and is not consistent with customary and traditional practices.

Federal Subsistence Board, Wildlife Meeting Materials May 3-4, 2005 at 211 ("Materials").

ADF&G's Deputy Commissioner responded to questioning and previous testimony with additional details regarding conservation concerns:

I'd like to make a general comment and then talk about your specific question. I agree with Dr. Wheeler that passing these proposals is not going to increase legitimate subsistence harvest. It's small and it's not going to change the people that take a brown bear for the meat or other purposes, subsistence purposes. However, we all know that when people have the opportunity to make significant amounts of money through illegal activity and there's very little chance of them getting caught or punished, there's going to be a small number of people that are going to take advantage of that system. That's what we're worried about. We know that claws from brown bears can be sold for significant money, up to about \$1,500 per brown bear for just the claws from the front and rear paws.

So we see a need to minimize the commercial sale of bear claws for brown bears at least while allowing the use and trade of claws for cultural purposes and regalia. We've never objected to that. I have a high degree of concern with the wide-open sales and, to me, that's a major leap when you move from sale among rural Alaskans for cultural purposes and move it into tourist shops across Alaska and I think that's a big thing. I don't mind the idea that someone has a small business and handles a few claws a year that he or she has taken themselves, but having it wide open in tourist shops that really bothers me.

When a person out there in the woods has a bear, has the claws, you're right, we can track that through our registration system, but once those claws enter into commerce, we don't have a way to track where they came from, whether they were from Kodiak or Southeast Alaska unless we put in some kind of requirement that the people who buy these claws have to keep records of where they purchased them and there's no regulation on that right now.

We know there is a market out there and people can make significant amounts of money. So I guess what we were trying to do is make sure that we meet the subsistence needs and the cultural needs for using bear claws and regalia and the trade and everybody can use them and have them, but to keep it out of the full-blown sale of these claws to anybody that wants to buy them. I guess that's what we've been trying to tell people and what we're trying to do here.

Transcript at 177-78.

The special agent in charge for the U.S. Fish and Wildlife Service Office of Law Enforcement in Alaska also noted enforcement problems with the proposed regulations:

I understand the Board's intent to make Region or Game Management Unit-specific regulations, but for enforceability I think that may raise some concerns. Regional or Game Management Unit-specific regulations are very effective when they are incorporated to meet a specific conservation goal and deal with limits, methods and means and other harvest restrictions. They generally concern take of the animal and not with its utilization. Take regulations are enforced in the field when and where the fish or wildlife is taken.

Regulations dealing with wildlife utilization on the other hand usually have no connection to the field either in time, place or harvester. An officer contacting a successful subsistence user in the field generally knows or can easily determine, one, who the hunter is; that is, he or she is a Federally-qualified subsistence user. Two, when the animal was taken; that is, during the open season. Where it was taken; that is, in an area opened to hunting. And if the harvest was legal.

The trend toward creating region-specific regulations concerning wildlife utilization on the other hand makes enforcement nearly impossible. The current proposals dealing with sales of handicraft fashioned from parts taken from bears harvested in a specific Game Management Unit is an example. An enforcement officer encountering bear parts out of the field, for example at a residence or handicraft items for sale at a business, a crafts fair or on display for sale over the internet has no way of knowing when, where or by whom the original animal was taken.

Black or brown bear parts taken from Southeast have the same characteristics as those taken in Southcentral or the Interior of Alaska. To

be enforceable, regulations concerning utilization in our view must cover species statewide.

Transcript at 203.

Some of the regional advisory councils also recognized that the proposal could cause conservation concerns, particularly if commercialization was not prevented.

The Southcentral Regional Advisory Council supported the proposal with modification and indicated that they did not want to allow the commercialization of handicrafts made from bear parts. Materials at 203-204.

The Kodiak/Aleutians Regional Advisory Council supported the proposal only with a modification to exclude sales of brown bear claws, noting that 'brown bear claws had the greatest potential for abuse if sales were allowed of handicrafts made from claws.' Materials at 204. During the Council meeting discussing proposals, member Holmes put the issue sharply into focus:

MR. HOLMES: Mr. Chairman, I think Sam hit on a really good point there, because I think in the past our RAC has never really been against anything that's of, you know, cultural or heritage value used for tribal regalia, and I think that that's really hitting the nail on the head. It's comes to when things can be sold commercially.

...

And to perhaps address Ivan's concerns on a number of [bears] taken, yeah, I agree with him, that it doesn't really make much difference if there's only one per village. But you've got 20 claws, and how do you identify that claw and how it came to that bear? Do you insert a microchip in it or some kind of a big tag that goes on it that has all the Federal and State regulations on each claw to track the claws? And that's a problem. How do you keep track of that, and how do you know when you -- somebody goes to a meeting in Las Vegas and there's somebody standing there with a bunch of Kodiak brown bear claws hanging on their neck. Where did those claws come from? Did they come from something that you collected for your village legitimately? Or did they come from some yahoo who came up and got drunk and blew away a bear while he was up here deer hunting, whacked the paws off and shoved it in the bag? And that's the tricky thing.

If there was some way to define it, where folks could use them, and they wouldn't get off, I'd be all for it, but I think with the understanding that we're not prohibiting cultural utilization in regalia with it being attached,

then I think I would like to make a motion, Mr. Chair, when the time comes up that we amend that to say excluding claws.

Kodiak/Aleutians Regional Advisory Council, Transcript at 42 (March 22, 2005).

The Bristol Bay Regional Advisory Council supported the proposal with modifications, including a modification that would have prohibited sales and purchases as part of business transactions. Materials at 205. Further, the Representative of the Bristol Bay Advisory Council, after hearing the state's comments noted:

There needs to be a paper trail on that. We're not asking just an open sale on these items. There needs to be a permit. . . . I believe the State of Alaska has an excellent point. If we are going to do this for sale, then there needs to be a paper trail to follow it up.

Transcript at 179.

The Yukon-Kuskokwim Regional Advisory Council also supported the proposal with modifications including a modification that would have prohibited sales as part of business transactions. Materials at 205-06.

The Eastern Interior Regional Advisory Council also supported the proposal with modifications intended to prevent sales from becoming a commercial enterprise. Materials at 206-07.

The Northwest Regional Advisory Council opposed the statewide proposal, Materials at 206, and requested that their region be excluded noting previous problems when sales of caribou antler were legalized:

Eight years ago when the caribou antler was legalized for sale in entire Game Unit 23, we saw hundreds of dead caribou everywhere. It went out of control. That is why the Northwest Arctic opposed this 5 proposal. The Council feels that if we support this proposal that it will definitely become the same as it did to the caribou eight years ago. We'll be seeing carcasses of black and brown bears everywhere.

Transcript at 166.

The Federal Staff Report noted: "Illegal harvest of both brown and black bears is an ongoing issue in the state; however, this proposal addresses bears that are legally taken for subsistence under ANILCA." Materials at 220. This statement exemplifies the fundamental reason that the Board's decision is not consistent with sound wildlife

management principles – it completely fails to consider enforceability and impacts on illegal practices either within Alaska or on the global trade in endangered and threatened species.¹ By focusing entirely on effects of legal harvest and use, the Board fails to recognize the basic fact that if there is a legal market for a wildlife part with a high value in illegal markets, the legal market will be used to mask illegal harvest and sale, and illegal harvest and sales can be expected to far exceed legal harvest and sale. These concerns were expressed by federal staff in reports to the RACS in 2004:

A regulatory law enforcement framework to control illegal harvest or to control the legal sale of brown bear fur handicraft items is not currently in place nor does it appear to be practical. This proposal generates many legal, biological, and cultural concerns. Should the board adopt this proposal, some rural residents will find this practice culturally objectionable. The sale of handicraft items made from brown bear parts could increase the potential for additional legal and illegal harvest, possibly

¹ These issues were raised by the BLM representative, Mr. Brelsford in 2004 in reference to Proposal WP04-01:

I heard it suggested that law enforcement is not a legitimate consideration in this. And again I would have to say I think our reasoning process does in fact have to take into account the law enforcement context. In my view, that represents one component of the, quote, recognized principles of fish and wildlife conservation.

So in my mind, the issue before the Board is really a balancing act. There are historic episodes of market driven overharvest through the commercialization of subsistence resources. The market hunting in the Nenana area and the impact, the role that that played in the establishment of Denali National Park would be one example. There are international examples where key subsistence resources were commercialized without meaningful regulatory regimes, and those resources were driven into extirpation in some cases. So I think we ought to put all of the elements on the table and think about the balancing act. We want to provide for the legitimate subsistence uses in regions, and we want to listen and learn from Councils about what those uses are. At the same time, I think we do want to take into account what law enforcement tells us about market pressures and so on.

FSB Transcript at 261-62. However, at its 2005 meeting the Board and staff failed to address issues regarding illegal take, instead stating repeatedly that the Board regulation applied only to legal take where the bear had to be eaten. Materials at 219-20; Transcript at 149, 152, 163, 184.

over-exploiting some populations. The development of a cash economy associated with the sale of wildlife products has often been shown to be detrimental to the species involved. Brown bear populations are usually small in number, have low population growth rates, low sustainable yields, higher commercial value, and are easily over-harvested. Adopting this proposal may result in increased illegal harvests and provide economic incentives that may lead to the wasting of some bear parts such as the meat. Individuals not previously associated with bear hunting could change their behavior and become bear hunters. Commercial trade in brown bear fur handicrafts could lead to an increase in illegal trafficking of endangered populations of brown bear outside of Alaska.

Wildlife Meeting Materials for March 18, 2004, Meeting of the Kodiak/Aleutians RAC at page 26.

Further, at the Board meeting on May 20, 2004, the interagency staff Committee stated:

The Federal threatened status of brown and grizzly bears in the Lower 48 States will require permits for the sale of brown bear parts, such as handicrafts, that would be taken outside of the borders of Alaska, and such a permitting process is not in place. Accordingly, there is no enforcement framework to limit the trade in brown bear handicrafts to those taken solely in Alaska, and permitting such trade without the proper permitting process would be contrary to wildlife conservation principles.

Federal Subsistence Board May 20-21, 2004, Meeting Transcript at 249 ("FSB 2004 Transcript"). No information was presented at the May 2005 meeting to indicate that this concern had been addressed.

As indicated in the state's RFR on Proposal WP04-01, there is strong indication that bears have been and will be taken for their claws alone. An August 4, 2004 article in the Anchorage Daily News reported that front claws had been cut from at least two brown bear carcasses that had been left to rot along the northern border of the Katmai National Park and Preserve. (Attachment 4 at 1) Katmai Superintendent Joe Fowler indicated that there had been no attempt to harvest other body parts of the bears. *Id.* The article addressed the issue of the sale of bear parts:

Illegal trafficking of bear body parts, especially black bear gall bladders and paws, has been increasing in recent years due to high prices paid by Asian and Internet dealers. It's against State law to sell brown bear parts.

But under new federal regulations for brown bears legally killed in certain subsistence hunts, people can resell grizzly hides and claws as part of handicrafts, said biologist Dan Laplant, with the Office of Subsistence Management in Anchorage.

An Internet search a few months ago turned up brown bear claws selling for \$30 to \$300, Laplant said. "I just wondered if there was a market for them."

Id. The Board and federal staff did not even mention this problem at the May 2005 meeting, and in fact, staff provided incorrect information, indicating that there had been no observed problems. Materials at 220; Transcript at 150, 215.

As shown above, the Board's regulations allowing unconstrained trade in bear parts in general and, particularly brown bear claws, is not consistent with sound wildlife management principles, thus the Board's decision to expand those regulations and delay any regulatory action constraining commercial sales must be reconsidered.

Although the take of brown bears for subsistence is very legitimate, because of the monetary value involved with bear claws, these regulations will provide a substantial incentive to take bears primarily for the purpose of commercial gain. The fact that the commercial value of brown bear claws, teeth, bones, and skulls is significantly higher than other wildlife parts makes it much more likely that conservation of brown bears would be compromised.

Given the enforcement and conservation concerns surrounding the sale of bear claws, teeth, bones, and skulls, and the lack of tracking mechanisms, it is clear that the terms of the regulations that allow unconstrained sales are not consistent with sound management principles or the conservation of healthy populations of brown and black bears. The Board should reconsider and repeal the application of the regulations to the sale of claws, teeth, bones, and skulls, especially in light of the fact that such sales have not been shown to be customary and traditional.

B. The proposed regulations are inconsistent with ANILCA and are arbitrary because they are based on incorrect information.

Reconsideration is required because the Board's determination that it was acceptable to defer action on the commercial sales issue, despite support from the majority of commenting Regional Advisory Councils for such constraints, was based on the Board's determination that there was no conservation issue; this determination in turn rests on incorrect information supplied to the Board indicating that the Board's previous regulatory action had not contributed to enforcement problems with waste of bears.

When the Board began discussions on the motion to postpone the commercial sale issue, the Solicitor advised the Board regarding the consequences of its actions:

If the Board acts on this, they should do so with the awareness that failure to enact this or something similar will leave the area unregulated for the next year.

Transcript at 212. The Chair responded:

So the bottom line being, as I pointed out, there is not a conservation issue. There are serious concerns that have been raised with regard to working on this and a serious commitment. Given the fact that there's not a conservation issue but there could be other severe implications and what I'm hearing from Board members and others is that people are willing to continue to work on (j)(8) without trying to disenfranchise people. So it's basically a work in progress as far as I can see. As long as there's not a conservation problem that anybody is aware of, we can work on it.

Transcript at 214. In response to ensuing questioning, the staff reiterated its earlier written and oral statements indicating that no problems resulting from the regulations allowing sale of bear products had been reported. Transcript at 215; *see also* Materials at 220, Transcript at 150. This statement was incorrect, incidents involving the killing of bears for their paws near Katmai National Park were reported and had previously been cited by the state in its RFR on proposal WP04-01. *See* Attachment 1 at 8. Because the lack of conservation issues was central to the Board's decision, use of this incorrect information requires reconsideration by the Board.

C. The proposed regulations are inconsistent with ANILCA because they authorize transactions that are not customary or traditional.

Reconsideration is required because, in adopting the bear claw regulations, the Board did not adhere to provisions of Section 803 of ANILCA, which authorizes only subsistence uses that are customary and traditional. The Board did not have substantial evidence before it that the sale, as opposed to the barter, sharing or use, of bear claws in handicraft items, was customary and traditional or a customary trade practice. Further, even if the Board were to find that barter had been replaced by sale, the record would still only support limited noncommercial sales between members of opposite clans; it would not support unconstrained commercial sale as a customary and traditional use, and it would not support sales by all rural residents.

“[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated.” *United States v. Lârionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156 (1977). ANILCA authorizes only subsistence uses that are “customary and traditional.” Section 803 of ANILCA defines “subsistence uses” as follows:

As used in this act, the term “subsistence uses” means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

16 U.S.C. § 3113 (emphasis added). To be a valid subsistence use under this section, then, any selling allowed must be “customary and traditional uses by rural Alaska residents of wild [bear].... for the making and selling of handicraft articles out of nonedible byproducts of ... wildlife resources taken for personal or family consumption ... [or] for customary trade.” *Id.* Every use listed is modified by the prefatory phrase “customary and traditional.” The argument expressed in the staff comments that as long as the harvest is customary and traditional no individual determination is needed for specific uses is unreasonable and in conflict with the wording of ANILCA. Further, this statute should also be narrowly construed because it constitutes a federal encroachment on a basic aspect of state sovereignty, a state’s authority over management of fish and game within its borders.²

The attempt in the staff report, Materials at 216-17 to compare the provisions of ANILCA dealing with customary and traditional use to the Marine Mammal Protection Act (“MMPA”) provision dealing with “authentic native article of handicraft” as interpreted in *Didrickson v. U.S. Dept. of Interior*, 796 F.Supp 1281 (D. Alaska 1991) is misleading and irrelevant. At issue in *Didrickson*, was an attempt by the Department of Interior to redefine the MMPA’s statutorily defined term “authentic native articles of

² “[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, courts will not construe a statute to alter the federal balance unless that result is unmistakably clear in the language of the statute. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 768, 120 S.Ct. 1858, 1870 (2000). ANILCA’s subsistence provisions involve the balance of federal power because management of fish and wildlife within its borders is “peculiarly within [a State’s] police powers.” *Baldwin v. Fish and Game Comm’n of Montana*, 436 U.S. 371, 391 (1978). U.S. 1, 11 (1928); see also 43 CFR Part 24 (Department of Interior Fish and Wildlife Policy: State Federal Relationships, indicating that federal power is a restrictive power).

handicrafts and clothing” to exclude “traditional” handicrafts that had not been made in recent history because of circumstances beyond the control of Alaska natives. The statute at issue in *Didrickson* did not define handicrafts in a manner requiring that the use be “customary and traditional” but instead defined them in terms of the materials used and method of production:

For the purposes of this subsection, the term “authentic native articles of handicrafts and clothing,” means items composed wholly or in some significant respect of natural materials, and which are produced, decorated or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting . . .

Didrickson at 1283. Unlike the MMPA, ANILCA limits “subsistence uses” to “customary and traditional uses.” ANILCA does not authorize the federal government to preempt state law to authorize uses that are not “customary and traditional.”

Federal courts have already acknowledged that ANILCA only authorizes “customary and traditional” subsistence uses on federal public lands in Alaska. As noted by the 9th Circuit Court of Appeals in addressing the scope of customary trade authorized by ANILCA, to be a valid subsistence use under ANILCA customary trade:

1. must be “customary and traditional;”
2. “must be conducted in a manner consistent with a subsistence lifestyle; ANILCA does not permit the establishment of significant commercial enterprises under the guise of subsistence uses;” and
3. where some sale is customary and traditional, “the size of the transaction or the manner in which it is conducted may place it outside the bounds of customary trade.”

United States v. Alexander, 938 F.2d 942, 948 (9th Cir. 1991). Under ANILCA and this judicial interpretation, only uses and transactions that are customary and traditional, consistent with a subsistence lifestyle, and within the bounds of customary levels are authorized by ANILCA.

There is nothing in the record of the Board to show that the sales allowed by the final rules are consistent with customary practice and in fact the record illustrates that such sales are not customary and traditional. The record before the Board at its May 2004 meeting did not establish whether or not the selling of handicraft items made with bear claws was a customary and traditional subsistence use in various parts of Alaska. There were no surveys or other competent data to show whether bear claw items were

traditionally sold. The record before the Board at its May 2005 meeting was somewhat more extensive, but this record showed only limited bartering among some Alaska Natives as customary and traditional. The Board's actions on WP05-01 expanded and continued the problems caused by the Board's unsupported actions on WP04-01 and are inconsistent with the requirement that subsistence uses be "customary and traditional" for the same reasons raised in the state's Request for Reconsideration on WP04-01, (Attachment 1) hereby incorporated by reference, as well as for the reasons set forth herein.

The record regarding proposal WP05-01 contains some analysis of cultural history related to the issue of use of bear claws, but it does not support a finding that sale of claws, teeth, skulls, or bones is a customary and traditional practice. See Materials at 216-218. A statement from a 1982 study regarding Koyukon Athabascans provides little support: "Today they [bear claws] are sometimes made into necklaces for sale to "outsiders,"" *id.* at 217, and is contravened by a statement indicating that the traditional practice was to discard the claws to ensure against their being dropped and offending the animals spirit. *Id.* The staff report also cites sales of "bear ear" headgear among Tlingit Indians, *id.* at 218, and a 2004 statement from the Chair of the Eastern Interior Regional Council indicating that he thought bear claw necklaces were sold in his region "We can come back in a year and probably dig up some information if you want it, and I'll bet it's there, because I see a lot of people wearing bear claw necklaces, and I'll bet you they paid a lot of money for it." Materials at 218 (*citing* 2004 FSB Transcript). Additional information concerning alleged sales in the Eastern Interior Region was not supplied for Board consideration on WP05-01. The staff used these general unsubstantiated statements to state that "there is evidence for the making and selling of handicrafts made of bear fur and claws," although they admitted that "the record is limited." Materials at 218.

Additional information was provided in materials pertaining to the related proposal WP05-03 and in the presentation of the Southeast Alaska Regional Advisory Council, indicating that that traditional regalia, including regalia made with bear claws, teeth, bones, and skulls, are usually made or repaired by members of an opposing moiety who are paid for their work. Materials at 288-90; Transcript at 154-55, 181-82. However, the information supplied related only to specific tribes and indicated that traditional sales were limited to sales to the members of the opposite moiety, and that the products were not resold, further, the information indicated that cash sales were a recent substitution for previous trading or barter:

If I can talk a little bit about our culture, which comes back to your point, Mr. Chair, region specific. In our culture, what happens in a potlatch, a (in Tlingit), if a big man was giving a party, he would ask for something that he wanted to be made to be made by the opposite clan. In

other words, you don't have your own clansman make this. You commission someone, your brother-in-law; they call them (in Tlingit), you commission them to make something for you. When the party occurs, you bring this out and it becomes at the party what's called (in Tlingit), a masterless thing, something that's owned by the clan. It no longer becomes yours. It's brought out. At that point it's not sold anymore. When that happens, it's taboo to sell that after its been made into a piece of (in Tlingit). But before you do that you have to buy it because at the same (in Tlingit) potlatch, the big man that asked for that piece to be made will pay out of the money that's collected at the party, in public will pay that person for the duties that they did. If they were to take a claw and make a claw headdress and it was to become part of the bear clan (in Tlingit), they would then pay that person in public and it could be what you may call significant. We usually try to pay our debts and make sure people are well-compensated for things that we ask them to do. This has happened forever, since time immemorial.

Like I said, I agree that the sale of (in Tlingit) is not allowed. That's something that's against tradition. But to make the (in Tlingit) in the first place commonly required you to use money. In the old days, it could have been blankets or pelts or bear hides or something. That was the money at that time, but now we use cash. So we've been doing this forever.

Transcript at 181-82. While this information might support a customary and traditional use finding for sales to members other clans for tribes in Southeast Alaska, it does not support a customary and traditional use determination allowing unconstrained sales or sales by other federally qualified subsistence users throughout Alaska.

Although bear claws and teeth may have been used by other Alaska Native groups, there is no evidence of customary and traditional sale by other groups. In fact, in some areas of the state such sales are not consistent with cultural beliefs and traditions. *See, e.g., Materials at 206 (Western Interior Region & Northwest Arctic Region).* The Chair of the Yukon-Kuskokwim Advisory Council indicated that in his region, bear parts are used but not sold.

A lot of our people back home they don't believe in selling a part of subsistence what they catch. . . You ask what did you do with the claws of the bear. I'll tell you what they do with them. Usually the people, elders and some young people, dancing out their Eskimo dance, they've got some in their belt. They don't sell them. I never hear anybody that sells them. They don't like to sell a part of the subsistence, but you can see them. They

use them for traditional. The elders are teaching the young people not to forget their traditional way of life.

Transcript at 180-81. The Kodiak Aleutians Advisory Council requested a modification to exclude brown bear claws, and during previous 2004 discussions on this issue noted that even displays of brown bear hides was considered disrespectful in the Aleut culture. Kodiak-Aleutians RAC Transcript at 13-22 (March 19, 2004).

Given those deficiencies, it is obvious that nothing in the administrative record supported the proposition that the unlimited level of sales allowed under the final rules is within customary and traditional bounds. The regulations relating to uncontrolled sale of handicrafts, by any rural resident, made with bear claws, teeth, skulls, and bones are inconsistent with ANILCA because they authorize uses that were not customary and traditional. The Board should reconsider and amend the regulations to limit sales of bear claws, teeth, bones, and skulls to sales necessary for the creation or repair of regalia, or at least to prohibit sales to nonqualified subsistence users. A failure to do so will likely create an environment for significant commercial enterprises involving bear claws.

D. The regulations allow commercial use of bear claws.

ANILCA does not authorize subsistence uses that are significant commercial enterprises. *United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). The final rules generally authorize transactions of any size, with no limits on the dollar values involved. This permits an enterprise that is potentially a significant commercial enterprise. The Board was presented with information from the state indicating that the claws from a single brown bear could sell for about \$1,500. Transcript at 178. Mr. Littlefield the Chair of the Southeast Regional Council indicated that some individuals would pay as much as \$3000 for a bear claw. Transcript at 156. Thus, the current regulations help create a commercial market for bear claws that will likely have an impact on bear populations beyond the legitimate subsistence harvest. Because of the incentives created by this regulation, it is likely that, in addition to increased levels of legitimate subsistence hunting, illegal hunting and illegal use of bears taken in other hunts will also increase, creating an entirely "commercial" market.

E. The regulations exceed the jurisdiction of the Board.

State statutes and regulations of general applicability prohibit the sale of bear claws. State Statutes provide:

(a) Unless permitted by AS 16.05 - AS 16.40, by AS 41.14, or by regulation adopted under AS 16.05 - AS 16.40 or AS 41.14, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase

fish, game, or marine aquatic plants, or any part of fish, game, or aquatic plants, or a nest or egg of fish or game.

AS 16.05.920(a). State regulations provide:

- (b) Except as provided in 5 AAC 92.031,³ a person may not purchase, sell, barter, advertise, or otherwise offer for sale or barter:
 - (1) any part of a bear, except an article of handicraft⁴ made from the fur of a bear;

5 AAC 92.200 (footnotes added).

The Federal Subsistence Board, pursuant to the decisions of the federal courts, under ANILCA, may adopt regulations providing for customary and traditional subsistence uses by rural Alaska residents. However, nothing in ANILCA or the court decisions interpreting ANILCA authorizes the Board to adopt regulations exempting persons who are not Alaska rural residents from the application of state laws of general applicability. Nonetheless, the Federal Subsistence Management Program has issued a question and answer sheet indicating that "it is the opinion of the Federal Subsistence Board that sales authorized in Federal subsistence regulations allow purchase by anyone." Attachment 3 at 2. Reconsideration is therefore required, because by purporting to authorize individuals who are not Alaska rural residents to violate state laws of general applicability; the Federal Subsistence Board has exceeded its authority.

F. The regulations violate section 7(a)(1) and 7(a)(2) of the Endangered Species Act.

Reconsideration is required because the regulations relating to sale of grizzly bear claws, teeth, skulls, and bones, without restrictions to prevent commercial sales, were adopted in violation of the requirements of section 7(a)(1) and 7(a)(2) of the Endangered Species Act. Section 7 of the Endangered Species Act provides in relevant part:

(a)(1) The Secretary shall review other programs administered by him and utilize such programs in the furtherance of the purposes of this chapter. All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of

³ 5 AAC 92.031 provides narrow exceptions relating to sales of unclaimed taxidermy work and sales in a bankruptcy or probate proceeding.

⁴ "Fur" as opposed to "skin" under state regulation does not include claws. See 5 AAC 92.990.

endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency, shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536. Guidelines adopted by the Fish and Wildlife Service require consultation whenever an agency action "may affect" listed species. *See* 50 CFR 402.14(a); *see also* Endangered Species Consultation Handbook, U.S. Fish and Wildlife Service and National Marine Fisheries Service (March 1998) at 2-6, 2-10.

Adoption of regulations is clearly an "agency action" within the definition of 16 U.S.C. § 1536(a). *See* 50 CFR 402.02. Grizzly bears in the conterminous states are listed as threatened; grizzly bears in Mexico are listed as endangered. 50 CFR 17.11.⁵ The "action area"⁶ for the regulations clearly extend beyond Alaska since, as written, the regulations allow national and international sales. As noted in Section III. A. above, evidence was presented to the Board indicating that because of the high value of grizzly bear claws, the proposed regulations would create a "legal" market which would mask and foster illegal sales, that there is no practicable way for enforcement officers to identify where a bear part was taken, and that there are no tracking or documentation requirements to allow enforcement officers to assist officers in determining whether a bear claw or other part was legally taken.⁷ The regulations were opposed by the Board's representative of the Fish and Wildlife Service in both 2004 and 2005, and in both years serious concerns regarding enforcement were raised. Based on this information, as well as comments from the majority of the regional advisory councils supporting constraints on commercial sales, it is clear that that the Board's regulatory actions regarding sales of

⁵ Some black bear species are also listed under the Endangered Species Act, however, the state's concerns regarding the Endangered Species Act center on the grizzly bear because the Board's regulations create an entirely new market with regard to this species; there are already legal markets for black bear parts in the United States and Canada that mask illegal sales of black bear parts. Further, grizzly bear populations are more vulnerable due to lower population densities and lower reproduction rates.

⁶ "Action area" is defined at 50 CFR 402.02 to mean "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action."

⁷ *See, e.g.,* ADF&G Written Comments at 1; Transcript at 166, 170-72, 177-78, 203; Materials at 211; FSB 2004 Transcript at 249.

grizzly bear claws, teeth, skulls, and bones would be detrimental to national and international efforts to protect endangered species and “may affect” listed grizzly bear species in the United States and Mexico. Nevertheless, the Board adopted the regulations regarding bear part sales without consulting with the Fish and Wildlife Service as required under section 7 of the Endangered Species Act.

Because the regulations were adopted in violation of section 7 of the Endangered Species Act, and because the Board retains ongoing discretion to repeal or revise the regulations,⁸ withdrawal and reconsideration of the regulations allowing sale of handicrafts made with brown bear claws, teeth, skulls, and bones is required. Upon reconsideration, either the regulations must be revised so that the Board may reasonably determine that they will not reach the level where they may “affect” listed species, or the Board must complete consultation under section 7 of the Endangered Species Act prior to adoption of final regulations.

G. The Regulations Are Arbitrary and Capricious.

Regulations, in order to be valid, must be reasonable, and not arbitrary or capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 822 (U.S. 1971). The object of the final rules is purportedly to provide for customary and traditional subsistence uses, but the record does not demonstrate that the transactions allowed are customary or traditional. Further, the adopted regulations are inconsistent with sound wildlife management principals, are based upon incorrect information, potentially allow commercial sales despite nearly uniform support for constraints on commercial sales by the regional advisory councils, and have been interpreted by the Board to authorize violations of state law by individuals who are not rural Alaska residents. Further, despite clear evidence that the regulations “may affect” species listed under the Endangered Species Act, the Board adopted regulations allowing the sale of bear part handicrafts without undergoing consultation required under section 7 of the Endangered Species Act. These logical defects render the final rules arbitrary and capricious. Accordingly, the Board should reconsider its decision to implement these invalid regulations and its decision to defer action on constraining commercial sales.

⁸ So long as an agency retains discretionary involvement or control over an action, it has a continuing obligation to comply with the requirements of the Endangered Species Act. See, e.g., *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024, 1033 (9th Cir. 2005) (Requiring EPA to consult regarding pesticide registration); *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 974-76 (9th Cir. 2003) (Requiring the NMFS to conduct consultation regarding issuance of permits); see also 50 CFR 402.03 (Applicability provision of consultation regulations).

IV. Conclusion.

The bear claw regulations are not based on sound management principles. They ignore the management and enforcement concerns of the state and federal enforcement officers. They authorize uses that are not customary and traditional, and that have the potential to develop into significant commercial enterprises. They are based on incorrect information, and as interpreted by the Board, they exceed the Board's authority. They were adopted in violation of the requirements of section 7 of the Endangered Species Act. They are arbitrary and capricious. For these reasons, the State of Alaska respectfully requests that the Federal Subsistence Board reconsider its final rules authorizing the sale handicraft items made from black and brown bear claws, teeth, bones, and skulls, and its decision to defer action on constraining commercial sales.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

DATED: _____

8/18/05



MCKIE CAMPBELL, COMMISSIONER